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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 459

DONALD M. JOHNSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Donald M. Johnson, Petitioner, respectfully prays that a writ of Certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above cause on August 21, 1947, affirming the judgment of the United States District Court for the Middle District of Pennsylvania, convicting him of conspiring to commit an offense against the United States under Section 37 of the Criminal Code, 18 USCA § 88.

OPINIONS BELOW

The Opinion of the District Court denying motion for judgment of acquittal will be found in the Record at page 925a-937a, and the Opinion of the Circuit Court of Appeals will be found in the record at page 1223. Neither Opinion is reported as of this date.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on August 21, 1947. A Petition for Rehearing was presented to the said court in due season, and on September 30, 1947, a rehearing was refused. No opinion was rendered. The Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended February 13, 1925 c, 229 § 1, 43 Stat. 938, 28 USCA 347.

SUMMARY STATEMENT OF THE FACTS AND OF THE MATTER INVOLVED

The Petitioner is one of ten defendants who were indicted on September 11, 1945, charged with conspiracy to obstruct justice in the Middle District of Pennsylvania and to defraud the United States (18 USCA § 88). The defendants were Albert W. Johnson, Senior Judge of the District Court of the United States for the Middle District of Pennsylvania, his three sons, namely, Miller A. Johnson, Albert W. Johnson, Jr., and Donald M. Johnson, your Petitioner, all members of the Bar, together with John Memolo, Jacob Greenes, Hoyt A. Moore, Joseph Paul Jennings, Charles Korman, and David Schwartz.

The Indictment contained forty-six overt acts, involving eleven different cases or proceedings in the District Court in which some action was claimed to have been taken by Judge Albert W. Johnson in violation of his duty and by means of which it was contended that the defendants and co-conspirators not named as defendants conspired together to effect the object and purpose of the conspiracy. The eleven cases mentioned as involved in the conspiracy are as follows:

1. Mt. Jessup Coal Company case;
2. Pennsylvania Central Brewing Company case;
3. Continental Cigar Company case;
4. Dervas Tobacco Company case;
5. Giant Drygoods Company case;
6. Charles Korman case;

7. Wilkes-Barre and Eastern Railroad Company case;

8. Theodore Koppelman case;

9. Kizis case;

10. Central Forging case; and

11. Williamsport Wire Rope Company case.

On Motions, the Indictment was dismissed against the defendants Hoyt A. Moore and Charles Korman, on the grounds that the matters in which they were involved were separate conspiracies and that as to them no overt act had occurred within the statutory period of three years prior to September 11, 1945. Charles Korman was concerned in his own case, which is No. 6 above, and Hoyt A. Moore, prominent member of the New York Bar, was alleged to have been involved in the Williamsport Wire Rope Company case, which is No. 11 above.

The defendant, Joseph Paul Jennings, had died prior to the date of the trial; a separate trial was granted as to David Schwartz because of illness.

The jury rendered verdicts of acquittal in favor of Judge Alfred W. Johnson and Albert W. Johnson, Jr., and verdicts of guilty against Miller A. Johnson, John Memolo, Jacob Greenes and your Petitioner, Donald M. Johnson.

On appeal, the Circuit Court of Appeals reversed the judgment of conviction of Miller A. Johnson for the reason that his participation was confined to only one incident having to do with the Williamsport Wire Rope Company case, and that the evidence was insufficient to establish his participation in the conspiracy charged, and affirmed

the conviction of John Memolo, Jacob Greenes, and your Petitioner.

As to Greenes and Memolo, each had made declarations before the Grand Jury, and this testimony was admitted in the case at bar against the declarant only. As to this Petitioner, Donald M. Johnson, the Circuit Court held that there was only one overt act within the Statute of Limitations. This overt act was not set forth in the Indictment. The Trial Judge charged the jury not to consider any overt acts not charged in the Indictment. However, the Circuit Court found that there was not a strong case against your Petitioner, but that this one overt act was sufficient upon which to base his conviction. Of the eleven cases mentioned in the Indictment, Petitioner is alleged to have been involved in only three of them, as follows:

I. *Giant Dry Goods Case.* The evidence was that Jacob Levy, uncle of Jacob Greenes, one of the defendants, requested Donald M. Johnson to secure for him an appointment as appraiser should the opportunity arise. There is no testimony that Levy promised Petitioner any part of his fee should he receive an appointment in any case. Some time afterward, in 1940, Levy was appointed appraiser in this Giant Dry Goods Case. He testified that Greenes demanded $250 out of his $350 fee. There is nothing in the testimony to show any connection of Donald M. Johnson with this transaction, or in fact, to show that he actually secured the appointment of Levy in the case above-mentioned (R. 117a-122a).

II. *The Central Forging Case.* The background and facts in this case were practically the same as presented

by the United States Government in the case of United States of America vs. Robert M. Michael, Harry Knight, George Fenner, Homer N. Davis and Donald M. Johnson, at No. 11348 Criminal, in the District Court for the Middle District. The Indictment in the first case involved the charge of conspiracy by the said defendants to secrete and conceal assets of the bankrupt Central Forging Company Estate. This case was heard by Hon. William F. Smith, Specially Presiding, and a jury, at Scranton, Pa. The trial lasted four weeks. The jury returned verdicts of acquittal in favor of your Petitioner, Donald Johnson, and Homer N. Davis, and verdicts of guilty as to defendants Knight and Fenner. The defendant Michael had previously pleaded guilty and testified as a Government witness.

This Petitioner pleaded that all of the facts concerned therein were res adjudicata in this proceeding, so far as concerned him, because he was acquitted of the crime for which he was indicted in the Central Forging Company case. The Trial Judge in the case at bar instructed the jury that it should not consider against Donald M. Johnson *any overt act* charged in the Central Forging Company case, which *overt act* was also charged in the case at bar. In this the Trial Judge was sustained by the Circuit Court of Appeals, on appeal, which dismissed from consideration any alleged overt act in connection with the Central Forging Company case.

However, the Trial Judge did not exclude from the jury's consideration the *facts* of the Central Forging case which had been introduced into evidence by the Government as part of its case and concerning which Petitioner's counsel made every effort to have excluded (R. 234a).

Failing in this, he endeavored to offer the record in the Central Forging case for the purpose of showing that the facts proven therein were the same as those in the case at bar, but the Trial Judge ruled that such record was inadmissible and the former acquittal of no consequence (R. 547-550). The Circuit Court found that the Trial Judge had adequately protected the Petitioner when he instructed the jury "that nothing which occurred that was connected in any way with the Central Forging case should be determined in considering his guilt" (R. 1226). A reading of the Charge on this point (R. 888a) indicates that the Circuit Court erroneously construed the instruction of the Judge, and that all the instruction did was to require the jury not to retry the Charge in the Central Forging case, that is, "the overt acts that are mentioned in the Central Forging case Indictment." Overt Act No. 5 in the Central Forging case is the filing of the account of Robert D. Michael, successor-trustee, on July 9, 1943 (R. 545a). Overt Act No. 33 in the case at bar is the filing of the account of Michael in the Central Forging case on July 9, 1943 (R. ———). This was within the statutory period, but was expressly excluded from the jury's consideration as to the guilt of Donald M. Johnson by the Charge of the Court above-noted, and also was excluded by the Circuit Court as an overt act as to Donald M. Johnson (R. 1226).

III. *The Williamsport Wire Rope Case.* This is the most involved of the eleven cases presented by the Government in support of its contention that there was a single conspiracy among the named defendants to obstruct and impede justice in the Middle District of Pennsylvania and to defraud the United States. Most emphasis was given to

this primarily because of the amount of money involved in the acquisition of the assets of the Wire Rope Company by the Bethlehem Steel Company. The receivership in the Wire Rope Company lasted over six years and was one in which numerous administrative steps occurred before the final sale of the property. John Memolo, one of the defendants, was co-counsel for the receivers, and much of the testimony revolves about the matter of fees for himself, for the accountant Maloney, and others. There was testimony that Donald M. Johnson, either alone or in company with Memolo, visited Judge Johnson in his Chambers several times during the pendency of this receivership; that Donald M. Johnson made inquiries of the Deputy Clerk about the proceeding and told him not to file the Opinion in the Wire Rope case until "the Boss said so", the "Boss" being Judge Johnson (R. 147a-159a-161a). The final decree in this receivership was signed on December 15, 1938, and the receivers discharged.

(Overt Acts Within the Statutory Period)

The Circuit Court expressly excluded Overt Act No. 33, the filing of Michael's report in July of 1943, as one to be considered by the jury in deciding the guilt or innocence of Donald M. Johnson, Petitioner. The Opinion makes it quite clear that so far as concerns Petitioner there is only one overt act to be considered, and that is the $350 check transaction in October of 1942. According to the testimony of Abe Greenes, brother of Jacob Greenes, a co-defendant,

by direction of his said brother, he, Abe Greenes, sent a check in the amount of $350 payable to "Donald M. Johnson, Attorney"; his brother Jacob gave him the cash and requested that the check be sent. He did not know what it was for, but Donald M. Johnson, testifying in his own behalf, stated that it was for attorney fees. The Circuit Court based its affirmance of the conviction upon this incident, because without it there was no overt act proven against Donald M. Johnson within the statutory period.

However, as pointed out above, (p. 5) the Trial Court excluded this act from consideration by the jury for the reason that it was not set forth in the Indictment by instructing the jury that they must find an overt act, "charged in the indictment, committed in pursuance of the conspiracy after that date (i. e., Sept. 11, 1942)" (R. 863a).

All of the appeals in these cases were argued together, and the case was very much complicated by the presence therein of the Grand Jury testimony which was admissible only against Jacob Greenes or John Memolo, the testimony relative to the Central Forging case which Petitioner contended was admissible against all of the defendants excepting himself, and the general complication of the matter by the presence of so many defendants as well as co-conspirators not named as defendants, and so much subject matter. It was further complicated by the fact that many of the defendants were not participants in some of the cases involved.

On Petition for Rehearing, your Petitioner urged the Circuit Court to reconsider its action in affirming the Lower Court, calling attention particularly to the fact, which had

been urged in the arguments, both oral and written, that the $350 check was not submitted to the jury as an overt act and was an isolated instance, shown to have no relation whatever to anything in the case, and was therefore not the basis of the finding of the jury of an overt act committed within the statutory period. The Trial Judge had specifically restricted the jury in its consideration of overt acts to the forty-six which are set out in the Indictment, and therefore the finding of the Circuit Court that they could base the conviction upon their finding that "the $350 check transaction had as its purpose the covering of an illegal transaction," was without basis as to petitioner.

The Petitioner also repeated in his Petition for Rehearing the argument theretofore made that, from the manner of Indictment and trial, it was quite apparent that there was not one single conspiracy proven, but a number of independent acts, many of which were not related to or dependent upon each other, the only figure holding them together being that of Judge Albert W. Johnson, and that when he was removed by a verdict of acquittal, the heart and core of a single conspiracy was torn out, and therefore only separate conspiracies may have existed, and under the case of *Kotteakos v. United States*, 382 U. S. 750, 66 S. C. 1239, this Petitioner was entitled to a judgment of acquittal.

Other matters raised were prejudicial error committed by the Trial Judge in refusing to withdraw a juror and continue the case because of improper remarks of the Government attorney; the error of the Trial Judge in stating to the jury that some of the overt acts had been proven; his error in failing to instruct the jury to find when the

conspiracy began and ended; prejudicial error in the Charge relative to the effect of character evidence; and the refusal of the Trial Judge to apply the doctrine of res adjudicata or estoppel as above-noted.

QUESTIONS PRESENTED

1. Section 37 of the Criminal Code (18 USCA § 88) requires not only a conspiracy or agreement between two or more persons, but also an act to effect the object of the conspiracy, which act must be performed within the period of three years prior to the indictment: *Brown v. Elliott*, 225 U. S. 392; 32 S. C. 812-815; *Pinkerton v. United States*, 145 F(2) 252-254 (CCA 5). The Circuit Court of Appeals based its affirmance of the conviction of Donald M. Johnson upon the jury's finding of one overt act within the statutory period, namely the receipt of $350 check which had no connection with any of the cases referred to in the overt acts of the Indictment and was itself not included as one of the forty-six overt acts. Was not this action of the Circuit Court erroneous in view of the fact that the jury, in its consideration of overt acts, was specifically restricted by the Trial Judge to the forty-six acts which are set out in the Indictment, and was not this decision of the Circuit Court in conflict with the decision of the Supreme Court of the United States in re *Herron v. Southern Pacific Co.*, 283 U. S. 91, 51 S. C. 383, as well as the later cases of *Quercia v. United States*, 289 U. S. 466, 53 S. C. 698-699, and *Gregory v. Morris*, 96 U. S. 619, 24 L. Ed. 740, which declare that it is the duty of the jury to follow the law as it is laid down by the court, and that there is a presumption it did so?

2. Is not the decision of the Circuit Court in conflict with the decision of the Supreme Court of the United States in re *Kotteakos v. United States*, 328 U. S. 750, 66 S. C.

1239, as to the requirements for proof of a general conspiracy, as all that was proven by the Government in this case was a set of isolated circumstances having no connection with each other and existing, if at all, at disconnected periods of time?

3. The name of Donald M. Johnson, this Petitioner, is mentioned very few times in the Transcript exceeding 3,000 pages of testimony. There was no direct evidence that Donald M. Johnson ever became a party to the alleged conspiracy, and in deciding that the circumstantial evidence upon which his connection therewith is based was sufficient, the Circuit Court has decided the question in conflict with the decision of the Supreme Court of the United States in *United States v. Ross,* 92 U. S. 281-284, 23 L. Ed. 707 and with its own decision in the case of *United States v. Russo,* 123 F (2) 420.

4. Did not the Circuit Court err in, after finding that the propositions of law submitted by Petitioner on res adjudicata or estoppel, were correct, refusing to apply them to the facts of this case, and in finding that the Trial Judge's Charge was adequate to protect the rights of the defendant? In referring to the Central Forging Case the Circuit Court, in its Opinion at page 1226, stated: "Since Donald M. Johnson is to have the benefit of the Trial Judge's instruction that nothing which occurred that was connected in any way with the Central Forging case should be considered in determining his guilt, Michael's filing in the Central Forging case cannot be used against Donald M. Johnson." By "Michael's filing," the court means the filing of Robert Michael of his account as Trustee in the

Central Forging case, which was charged as an overt act in the case of *United States v. Fenner, et al.*, and in which case Donald M. Johnson was acquitted. This finding of the Circuit Court is not borne out by the record as the court overlooked the fact that what the Trial Judge said to the jury was:

> "That you do not retry as to Donald Johnson, the charges in the indictment which is in evidence and which I have outlined to you, and specifically, that you shall not consider in this case as to him the overt acts which are mentioned in that Central Forging case indictment. You will find them listed, there are five of them, and it includes the receiving of $2,500.00. * * * In that regard you pay no attention to those specific acts in the Central Forging Case as regards Donald Johnson. However, all of the other matters in evidence are also as to him" (R. 888a).

All that the Trial Judge did in thus charging the jury was to tell them that the *overt acts* charged in the Central Forging Case would not be considered in determining the guilt of Donald M. Johnson. Counsel for Donald M. Johnson had requested the Court to charge that the jury must not re-try the *facts* in the Central Forging Case as to Donald M. Johnson. As an example of this, there was the perjury of Robert Michael, committed within the statutory period for a prosecution in the case at bar, but pertaining only to the Central Forging Case, and not listed as an overt act in either case. It will be noted that the court charges as one of the overt acts which must not be considered "the receiving of $2,500". The Trial Judge did not exclude the

perjury of Michael nor the conversation alleged to have occurred between Michael and Donald M. Johnson as to the testimony of Michael. Prior, in the course of the trial, the Trial Judge had refused to permit Donald M. Johnson to introduce into evidence the record of the Central Forging Case so as to show that the *Facts* in that case and the *Facts* in the same matter introduced at this trial were the same.

5. Did not the Circuit Court err in finding that the Charge of the Trial Court was sufficient, relative to the beginning and ending of the alleged conspiracy?

6. Did not the Circuit Court err in its finding as to the Charge of the court on character evidence, deciding that the charge was correct and within the decisions of this court in *United States v. Quick*, 128 F(2) 832 and *United States v. Frishling*, 160 F(2) 370, for the reason that the said decision is in conflict with that of the decision of the Supreme Court of the United States in *Edgington v. United States*, 164 U. S. 361-66, 17 S. Ct. 72-74, 41 L. Ed. 467, to the effect that "good character when considered in connection with the other evidence in the case may generate a reasonable doubt; the circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although, without it, the other evidence would be convincing."

7. Did not the Circuit Court err in affirming the action of the Trial Judge in refusing to withdraw a juror and continue the case because the prosecuting attorney referred to Hoyt A. Moore, Attorney-at-Law, as "a criminal conspirator?"

8. Did not the Circuit Court err in affirming the action of the Trial Judge in deciding as a matter of law that certain overt acts "were proven" (without specifying which of the forty-six acts he referred to as proven) instead of submitting the facts to the jury for such finding, thereby usurping the functions of the jury?

REASONS FOR ALLOWANCE OF THE WRIT

1. The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court relative to the requirement that an overt act be committed within the statutory period in order to convict defendant of conspiracy under 18 USCA § 88.

2. The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court which require the jury to accept the law as stated by the Trial Judge, even though it be erroneous and which presume that the jury has followed such instructions.

3. The decision of the Circuit Court is in conflict with the decision of this Court in re *Kotteakas v. United States, supra,* as to the requirements of proof of a general conspiracy and connection of Petitioner therewith.

4. The decision of the Circuit Court is in conflict with the decision of this Court as to the effect of character evidence in a criminal case.

5. The decision of the Circuit Court is in conflict with the decisions of this Court relative to the application of the doctrine of res adjudicata or estoppel in a criminal case.

6. All of the defendants who were tried, excepting John Memolo, Jacob Greenes, and your Petitioner, have been acquitted either by the verdict of the jury or by the judgment of the Circuit Court. Memolo and Greenes were found by the Circuit Court, by reason of their admissions before the Grand Jury which were offered in evidence

against them, to have "virtually confessed their guilt." Only your Petitioner remains and as to him the Circuit Court found "that there is not so strong a case because the damaging Grand Jury admissions were available only against those who made them" (R. 1228). The evidence admissible against Donald M. Johnson is not nearly so voluminous as against Judge Albert W. Johnson and Albert W. Johnson, Jr., who were acquitted by the jury, and no more serious than against Miller A. Johnson, who was granted judgment of acquittal by the Circuit Court. However, all the evidence, including the Grand Jury testimony and the Central Forging case, was before the jury, and while the use of the same was restricted by the Trial Judge, it was heard by them day after day for four weeks, and it must have been impossible to disassociate and distinguish the competent from the incompetent testimony when considering any single defendant. Even the Opinion of the Circuit Court shows the influence of this inadmissible testimony, perhaps subconsciously only, but nevertheless, present in the minds of the learned Judges.

7. Donald M. Johnson, Petitioner, has been illegally convicted, as the requirements of Section 37 of the Criminal Code (18 USCA § 88) have not been met by the Government's proof.

For the reasons hereinbefore set out, it is respectfully submitted that the Petition for Certiorari should be granted.

Respectfully submitted,
CHARLES J. MARGIOTTI,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The statute under which your Petitioner was convicted is section 37 of the Criminal Code (18 USCA § 88), which reads as follows:

> § 88 *(Criminal Code, section* 37.) ***Conspiring to commit offense against United States.*** If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

To sustain a conviction under the said statute, it is imperative that the Government shall have proven beyond a reasonable doubt all of the elements of the offense, namely, a conspiracy or agreement among the several parties involved to commit an offense against the United States, and also an overt act to effect the object of the conspiracy. The Statute of Limitations, namely, R. S. § 1044, as amended December 27, 1927, 45 Stat. 51, 18 USCA 582, requires that the Indictment must be found within three years next, after the offense shall have been committed. In *Brown v. Elliott*, 225 U. S. 392; 32 S. C. 812-815, and similar cases, it is held that the overt act required by Section 37 must have been performed within the period of three years prior to the finding of the Indictment; otherwise, there can

be no conviction under the said section of the Criminal Code.

I. NO GENERAL CONSPIRACY PROVEN AS REQUIRED BY KOTTEAKAS CASE.

The Circuit Court in the case at bar found that there was sufficient evidence of a general conspiracy among the defendants and co-conspirators or some of them, and of the connection of Donald M. Johnson, Petitioner, therewith. It has been the position of Petitioner that this case has not met the requirements of the decisions of the Supreme Court relative to the subject involved. The eleven separate and distinct cases referred to in the Indictment were unrelated to each other and possessed no connecting link, excepting that Judge Albert W. Johnson was the presiding judge in each of them. In his argument before the Circuit Court, both oral and written, Petitioner sought to impress upon the court this fact, but a reading of the Opinion shows that the court misunderstood entirely Petitioner's position. It was urged that throughout the entire trial Judge Albert W. Johnson was referred to as the "heart and core of the conspiracy" and that if he were omitted from the case as a conspirator, there was nothing to connect the several proceedings, and each revolved upon its own axis as a separate conspiracy. It was not the contention of the Petitioner that because Judge Albert W. Johnson was acquitted by the jury he likewise must be acquitted; but rather that the acquittal of Judge Albert W. Johnson removed him as an alleged

conspirator, and the key figure, so that there was nothing left but a number of separate conspiracies. The Trial Judge had correctly instructed the jury that they must find one conspiracy in order to convict any of the defendants, and referred also to the fact that there was a separate conspiracy in the Central Forging case.

This separate conspiracy theory was also borne out in the Circuit Court's Opinion, when it directed a Judgment of acquittal for Miller A. Johnson because he was involved only in the Williamsport Wire Rope case. This theory had been accepted and applied by Judge Smith, specially presiding in the Middle District, when he ordered the dismissal of Charles Korman and Hoyt A. Moore as defendants, because they were involved respectively in the Korman case and in the Williamsport Wire Rope case.

It is the contention of the Petitioner that the decision of the Circuit Court on this question is in direct conflict with the decision of the Supreme Court of the United States in *Kotteakas v. United States*, 328 U. S. 750, 66 S. C. 1239, and with the decision of the Court of Appeals for the Ninth Circuit in the case of *Canella v. United States*, 157 F(2) 470. *Kotteakas v. United States* was a prosecution under the section of the Code above-referred to for conspiracy to violate the provisions of the National Housing Act. The defendants were indicted for a single conspiracy as in our case, but the proof showed a number of independent conspiracies. The Supreme Court stated that "the jury could not have possibly found from the evidence that there was only one conspiracy" (page 1249), and again at page 1252, the Supreme Court says:

"We do not think that either Congress, when it enacted Section 269, or this Court, when deciding the Berger case, intended to authorize the Government to string together for common trial eight or more separate and distinct crimes, conspiracies relating in kind though they might be, when the only nexus among them lies the fact that one man participated in all."

Canella, et al. v. United States followed the ruling in the *Kotteakas* case, holding that where an Indictment alleged a single conspiracy to defraud the United States, and the proof showed existence of five conspiracies involving at least twelve persons, and with four of which conspiracies two of the defendants were not concerned, there was a fatal variance as to such defendants. In our case the evidence available against Donald M. Johnson, Petitioner, shows that he had no knowledge of and had no connection with the following alleged conspiracies:

1. Mt. Jessup Coal Company case;
2. Pennsylvania Central Brewing Company case;
3. Dervas Tobacco Company case;
4. Charles Korman case;
5. Continental Cigar Company case;
6. Wilkes-Barre and Eastern Railroad Company case;
7. Andrew Kizis case;
8. Theodore Koppelman case.

Likewise, the evidence is wholly bare of facts that Donald M. Johnson knew four of the ten defendants named

in the Indictments: Hoyt A. Moore, Joseph Paul Jennings, Paul Korman, and David Schwartz, or that he knew four of the five persons named in the Indictment as co-conspirators but not as defendants, namely, Kilcullen, Martin Memolo, Crolly, and Maloney.

Both the Trial Court and the Circuit Court proceeded on the theory that the single conspiracy charged in the indictment could be established by evidence of transactions between Memolo and Greenes with other conspirators, whose common purpose with Donald Johnson had not been shown. We think that the *failure to establish this common purpose* left each of the transactions between Memolo and Greenes, and parties other than Donald Johnson independent of him and without his knowledge, separate and distinct alleged conspiracies.

If we take the cases against Memolo and Greenes—including the evidence ruled available against all defendants, plus their Grand Jury admissions—we find proof of a single conspiracy in which either Judge Johnson or Greenes was the common key figure. Even in the cases against Memolo and Greenes, however, we find from their admissions the existence of several separate conspiracies—for example, the alleged conspiracy between Donald Johnson, Robert Michael and others in the Central Forging Company case, and the alleged conspiracy between Miller Johnson, Albert W. Johnson, Jr., Donald Johnson and Townsend in the Williamsport Wire Rope Company case. The point to be remembered is that under this theory of the case the common key figure—if any—would have been either Judge Johnson or Greenes.

Yet, when we consider the evidence which was ruled admissible as against all defendants, we find at least four separate theories as to the character of the alleged conspiracy or conspiracies involved. The only question is whether the defendant has suffered substantial prejudice from being convicted of a single great conspiracy by evidence, which viewed in the light most favorable to the Government, proved not one conspiracy, but some eight or more different alleged conspiracies of the same sort, executed not through a common key figure similar to Simon Brown in the Kotteakos case, but executed with no key figure appearing in all of said alleged conspiracies.

The Government's evidence as it applies to all defendants shows that there was no common and key figure in all of the transactions alleged to have been proven, a key figure similar to Brown in the Kotteakos case, or the key figure in the Canella case.

For the purpose of this argument only, we are assuming that certain conspiracies were proved. If so, we find:

(1) That *Greenes* was the common key figure with others in these cases:

(a) With Memolo and Kilcullen in the Mt. Jessup Coal Co. case;

(b) with Memolo and Maloney in the Pennsylvania Central Brewing Co. case;

(c) with Bartikowsky in the Pennsylvania Central Brewing Co. case;

(d) with Memolo, Katz and Korman in connection with the imposition of sentence in the Korman case;

(e) with Korman and his attorney in connection with the application of termination of probation in the Korman case;

(f) with Jacob Levy and Donald Johnson in the Giant Dry Goods case;

(g) and with Memolo and Maloney in the Williamsport Wire Rope Co. case.

(2) *Memolo* was the common and key figure with others in these cases:

(a) with Moore, Mumford, McMath, Martin Memolo, Crolly, Taylor, and Maloney in the Williamsport Wire Rope Company case;

(b) with Judge Johnson, Albert Johnson, Jr., and Donald Johnson in the Wire Rope Company case.

(3) Totally separate from the foregoing two series of conspiracies, we find two disconnected alleged conspiracies in these cases:

(a) between Judge Johnson, Miller Johnson, Albert Johnson, Jr., Donald Johnson and Townsend in the Williamsport Wire Rope Company case; and

(b) between Judge Johnson, Donald Johnson, Michael, Reifsnyder, Fenner, Knight and Davis in the Central Forging Company case.

(4) And aside and apart from the foregoing three sets of conspiracies, we have hanging in mid-air:

(a) a $350.00 check, given by Abe Greenes at Jacob Greenes' request to Donald Johnson, attorney.

No connection was shown between the other defendants and co-conspirators involved in:

Group (1) where Greenes was the key figure;

Group (2) where Memolo was the key figure;

and Donald Johnson, other than the testimony of the witnesses Moran, Beecham, Kalp and Martin, as to associations between Donald Johnson and Greenes, the testimony of the witness Houck that he had seen Donald Johnson and Memolo in Judge Johnson's office in 1937 in connection with the Williamsport Wire Rope Company case, and that, on various occasions, Donald Johnson had inquired of him as to the status of certain unknown cases with which petitioner had no connection, and also other than the testimony of the witness Katz, that at one time Greenes had told him to see him if he wanted cases fixed in the Federal Court in Scranton. In many cases other defendants and co-conspirators did not have any relationship with one another—not even Greenes or Judge Johnson or Memolo's common connection with each case, as the Supreme Court had in Brown's connection with each transaction involved in the Kotteakos case.

No connection was shown between the other defendants and co-conspirators involved in group (3) and those named in groups (1) and (2).

We contend that both the Trial Court and the Circuit Court ignored the existence of separate transactions, which would bring this case within the rulings of the Kotteakos and Canella cases. This was a complicated case not only for the attorneys for defendants and the prosecuting attor-

neys, but also for the trial court and, especially, for the jury.

The Circuit Court acknowledged this difficulty at page 1228 of its Opinion:

> "The case was complicated for the jury and for us by the fact that a great deal of important testimony, due to the various exclusionary rules of evidence was not available against all defendants. Thus, some very damaging testimony of previous statements to a Grand Jury was available only as against defendants Memolo and Greenes. Again, defendant Donald Johnson had previously been acquitted of charges growing out of one of the particular incidents which was part of the Government's case. He was entitled to such protection as the law gives him by the fact of that acquittal * * * The jury had to consider the testimony given in the course of a long trial and its different bearing upon different defendants."

Unlike the Kotteakos case, we have no pattern of "separate spokes meeting at a common center, without the rim of the wheel to enclose the spokes." All we have are three groups of spokes lying loose in space, not only without the rim of the wheel to enclose the spokes, but also meeting at no common center. And lying far away we find a small spoke (the $350.00 check transaction), far too broken to be affixed to any wheel.

We cannot even apply the analogy used in the comment by the Court of Appeals in the *Kotteakos case*, 151 Fed. 2d at 173—that, "thieves who dispose of their loot to a single receiver—'a single fence'—do not by that fact

alone become confederates, they may be, but it takes more than knowledge that he is a 'single fence' to make them such''. Neither did all the defendants and conspirators in this case become confederates merely because at one time or another they had associations with either Greenes or Memolo.

It is submitted that this case is analogous to the Kotteakos case where one conspiracy only was charged and at least eight, having separate though similar objects, were made out by the evidence. Here the Indictment likewise charged only one conspiracy, but the evidence, if believed, showed that the more than fifteen parties participating in the eleven or more different schemes were on the whole, except for three separate sets of common key figures, different persons who did not know or have anything to do with one another.

In *United States v. Gordon*, 138 F. (2) 174 (CCA. Ill.) it was held that the common design which is the essence of the crime of conspiracy may be made to appear when the parties steadily pursue the same object whether acting separately or together by common or different means, ever leading to the same unlawful result. Accord: *American Tobacco Company v. United States*, 147 F. (2) 93 (CCA. Ky.) aff. 66 Supreme Court 1124.

It is submitted that the activities of the various defendants and co-conspirators were not so numerous in this case as to constitute a course of business, or so related as to constitute a system of unlawful conduct continuing over a long period of time as to warrant the jury in finding the

defendants guilty of a great general single conspiracy. Although an agreement for conspiracy may be shown by a concert of action where all parties work together understandingly with a single design for accomplishment of a common purpose, the record in this case is bare of any facts to show either a single design or common purpose. There is absolutely no connection between the arrangement made between Greenes and Bartikowsky in the Pennsylvania Brewing Company case, the arrangements made between Greenes, Memolo and Maloney in the Pennsylvania Central Brewing Company case and in the Williamsport Wire Rope case, the arrangements made between Greenes, Korman and Memolo in the Charles Korman case, and the arrangements alleged to have been made between Greenes, Korman and Memolo in the Charles Korman case, and the arrangements alleged to have been made between Miller Johnson, Townsend, Judge Johnson, Albert Johnson, Jr., and Donald Johnson in the Williamsport Wire Rope Company case, or the arrangements alleged to have been made between Memolo, Moore, McMath, Martin Memolo, Crolly and Maloney in the Wire Rope case, or the conspiracy alleged to have existed in the Central Forging Company case between Donald Johnson, Michael, Reifsnyder, Fenner, Knight and Davis.

Here there was no purpose common to Donald Johnson or Schwartz, nor to Donald Johnson or Kilcullen, nor to Donald Johnson or Maloney or Korman, nor to Donald Johnson or any of the others whose acts formed separate spokes in this rimless wheel. Nor was there any evidence connecting Donald Johnson with the conspirators named in groups (1) and (2).

The Government contends that long before he knew of the Korman case, Greenes told Katz that any time he wanted a case fixed in the Federal Court in Scranton, he should see him. To insert Donald Johnson into a broad conspiracy to sell justice merely on this statement and on his association with Greenes, is merely conjectural and speculative, and is not sufficient to give rise to an inference that Donald Johnson was engaged in a general conspiracy with Greenes and Memolo.

It is respectfully submitted that this is a stronger case for the application of the ruling in the Kotteakos case than were either the facts in that case or in the later Canella case. In the Kotteakos case the proof showed eight separate conspiracies and thirty-two conspirators. In the Canella case the proof showed five separate conspiracies, and twelve conspirators. In the case at bar, there is proof of more than eleven separate alleged conspiracies in which fifteen named and many other parties are alleged to have participated as conspirators. Not only were there probably as many conspirators involved in this case, but there were certainly more separate and distinct conspiracies alleged proved than were in either the Kotteakos or Canella case. Without doubt, it is "highly probable that the error (of mass trial) had substantial and injurious effects or influence in determining the jury's verdict" (66 Supreme Court, 1253).

II. ERROR OF CIRCUIT COURT IN DECIDING THAT PETITIONER WAS MEMBER OF ALLEGED GENERAL CONSPIRACY

The Circuit Court of Appeals found not only that there was a general conspiracy but also that there was sufficient evidence to connect Donald M. Johnson therewith (R. 1228). As set forth in our Petition for Certiorari (pages 5-8), the evidence tending to connect Donald M. Johnson with any of the overt acts charged in the Indictment was confined to three cases, namely, the Giant Dry Goods Company case, the Central Forging Company case, and the Williamsport Wire Rope Company case. In order to find that he was a member of a general conspiracy to obstruct justice in the Middle District of Pennsylvania, which alleged conspiracy was in progress and operation for a period of more than ten years, certainly something more is required than the evidence of chance meetings between Donald M. Johnson and John Memolo, the presence of Jacob Greenes in the office of Donald M. Johnson, conferences between Donald M. Johnson and Judge Johnson, his father, the nature of which did not appear in the evidence, and similar insignificant occurrences. The law requires much more in order to brand a man as a member of a criminal conspiracy. In the case of *Dennert v. United States*, 147 Fed. 2d 286 (CCA. Ky.) and in *United States v. Koch*, 113 Fed. 2d 982 (CCA. N. Y.) the Court of Appeals held that the defendant's participation in or knowledge of a conspiracy might not be inferred from his casual and unexplained meetings with others charged in the indictment.

In *United States v. Falcone*, 311 U. S. 205 61 S. C. 204, (1940 at page 206), the Supreme Court stated:

> "But it could not be inferred from that (that one of the defendant's customers * * * was using the purchased material in illicit distilling), or from the casual and unexplained meetings of some of the respondents with others who were convicted as conspirators that respondents knew of the conspiracy. The evidence respecting the volume of sales to any known to be distillers is too vague and inconclusive to support a jury's finding from the size of the purchases even though we are to assume what we do not decide that the knowledge would make them aiders or abettors of the conspiracy. Respondents are not charged with aiding and abetting illicit distilling, and they cannot be brought within the sweep of the Government's conspiracy dragnet if they had no knowledge that there was a conspiracy."

In *United States v. Andolschek*, 142 Fed. 2d 503 (CCA. N. Y.) the Court of Appeals for the 2nd Circuit held that the fact that A makes a criminal agreement with B does not cause A to become a party to the conspiracy into which B may enter or may have entered with third persons, but the scope of the agreement actually made, measures the agreement. A party to a conspiracy need not know the identity or even know the number of his confederates. But when he embarks on a criminal venture of a definite outline, he takes his chances as to its contents and member, if they fall within the common purpose as he understands them, but he must be aware of those purposes, and must

accept them and their implications if he is to be charged with what others may do in execution of them.

In *Canella v. United States, supra*, it was held that mere knowledge that a conspirator is engaged in other criminal conspiracies with other persons of the same general nature is not sufficient to make him a party conspirator thereto.

The Petitioner respectfully contends that any attempt to connect him with a general conspiracy in this case must be based upon circumstantial evidence entirely, and that the implied finding of the Circuit Court that the circumstances existed in this case is in conflict with the decision of the Supreme Court in *United States v. Ross*, 92 U. S. 281-284, 23 L. Ed. 707, which requires that "whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved and not themselves presumed". This statement of the law was followed by the Circuit Court for the Third Circuit in the case of *United States v. Russo*, 123 F. (2) 420, where after quoting the foregoing portion of the opinion in the Ross case, the Circuit Court, per Circuit Court Judge Jones, says, at page 423:

> "A presumption may not be rested upon another presumption. United States v. Ross, supra, 92 U. S. at page 283, 23 L. Ed. 707; Dahly v. United States, 8 Cir., 50 F. 2d 37, 43; Ribaste et al. v. United States, 8 Cir., 44 F. 2d 21, 23; Gerson v. United States, 8 Cir., 25 F. 2d 49, 60; Brady v. United States, 8 Cir., 24 F. 2d 399, 404. The rule could not be otherwise if the legally permissible effect of circumstantial evidence is to receive due respect. In order to justify a conviction

of crime on circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt. See United States v. Baker et al., 2 Cir., 50 F. 2d 122, 123; Glass v. United States, 3 Cir., 231 F. 65, 68; Hart v. United States, 3 Cir., 84 F. 799, 808."

In the *Russo* case the Circuit Court directed a judgment of acquittal, saying:

> "In a case, therefore, such as the present, where there is an utter want of any evidence as to the defendant's knowledge that the property was stolen (except for his constructive possession thereof), an inference of his innocence of any such knowledge is as readily deducible as is an inference of knowledge. It follows therefore that the evidence was insufficient to support a conviction."

We respectfully submit that if the jury and the court had been able to disassociate from consideration the Grand Jury testimony admissible only against Greenes or Memolo, there would have been left no foundation upon which to rest a finding of the connection of this Petitioner with the alleged general conspiracy. Each of his actions is as consistent with his innocence as with his guilt; therefore, under the foregoing decisions, he should have been acquitted.

III. NO OVERT ACT FOUND WITHIN THE STATUTORY PERIOD

As above-noted, the Criminal Code requires not only a conspiracy and the defendant's connection therewith, but also that an overt act to effect the object of the conspiracy must be found by the jury within the statutory period of three years prior to the date of the finding of the Indictment—in this case, three years prior to September 11, 1945. As noted in the Petition for Certiorari, the Circuit Court eliminated from consideration, so far as concerns this Petitioner, all overt acts excepting the $350-check transaction which occurred in October of 1942. From this single isolated instance alone the Circuit Court found sufficient evidence upon which to base the conviction of your Petitioner. Standing alone, this transaction is more consistent with innocence than with guilt of the Petitioner. However, had it been connected by competent evidence with one of the cases or proceedings referred to in the Indictment, then a conviction based thereupon might not have been improper *if the matter had been properly presented by the Trial Judge to the Jury when he gave them his Charge.*

While it may be true as a legal proposition that the Government may prove overt acts not set out in the indictment, yet it is also true that the jury in considering the case must accept the law as stated to it by the trial judge and that it is presumed to have followed his instructions.

In *Herron v. Southern Pacific Company*, 283 U. S. 91, 51 S. C. 383, Mr. Chief Justice Hughes in writing the opinion of the court stated the law to be as follows:

> "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct *and of determining questions of law.* This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides. As was said by Mr. Justice Story, in United States v. Battiste, 2 Summn. 240, 243, Fed. Cas. No. 14,545; *'It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court.'* "

This case is followed in the later criminal case of *Quercia v. United States*, 289 U. S. 466, 53 Supreme Court Reporter 698-699.

In *Gregory v. Morris*, 96 U. S. 619, 24 L. Ed. 740, the Supreme Court decided that, "As the jury did not find contrary to the instruction, the presumption is that they followed it."

The Circuit Court adopted this same presumption as to the jury in the case at bar when referring to the instruction of the Trial Judge that the Grand Jury testimony could be used only against certain defendants. In a footnote of the Opinion, we read the following:

> "The jury apparently followed the instruction and excluded from their mind the evidence which was incompetent only as to one particular defendant (Judge Johnson) when considering his guilt or innocence."

We respectfully refer the Court to the following portions of the Charge which clearly show that the $350.00

check *was never before the jury as an overt act,* and therefore, they not only could not, but under the foregoing authorities, did not consider it as such overt act in furtherance of the alleged conspiracy.

At page R. 812a, the court charged:

"It is further alleged that the defendants and co-conspirators during the continuance of the conspiracy did commit and do overt acts to effect the object and purpose of the unlawful and felonious conspiracy, confederation, combination and agreement as to the means, manner and method of carrying out the same.

Thereafter *there are alleged forty-six separate acts claimed to have come within this classification.*

As I said before, you will have with you in your jury room the indictment, and you may refer to the document for the purpose of finding what the charge is that is made therein. In this connection the Court will caution you that neither the finding of the indictment nor the charges therein contained, though they be in positive language, furnish any proof or inference of guilt on the part of any of the defendants charged therein. The indictment is simply a statement in solemn form made by the Grand Jury of the United States against the defendants, and together with the pleas of 'Not Guilty' entered by the respective defendants, makes up the issues of fact which are to be tried in this case. To this indictment the defendants and each of them have entered pleas of 'Not Guilty'. A plea of 'Not Guilty' as to each of the respective defendants puts in issue each and every of the material allegations

of the indictments as to him. And so the issues of fact are made up fully on the proof that is brought before you by the respective parties, the United States on one hand and the respective defendants on the other."

At page R. 813a the judge instructed the jury as follows:

"Fourth, the Government must further prove beyond a reasonable doubt that the defendant under consideration did combine, conspire, confederate or agree with other persons or another person in the manner and form set out in the indictment, to commit offenses against the United States *in the manner set out in the indictment*, and that thereafter one of the defendants *did commit and do an act alleged as an overt act* to effect the objects and purposes of the conspiracy, confederation, combination and agreement, and reasonably calculated to effect the same, *in the manner and form set out and alleged in the indictment in this case.*"

At page R. 814a he charged:

"Nor is it necessary to prove that any of the overt acts were committed at the time in which they are specified in the indictment. It is sufficient if a conspiracy be found beyond a reasonable doubt that it continue in existence and force and validity for a period of time within three years of the finding of the indictment, which was the 11th day of September, 1945. If such a conspiracy be found *and an overt act as charged in the indictment* be found to have been done within three years of the finding of the indictment, that would be sufficient."

At page R. 821a, the Court charged as follows:

"In the indictment in the case at Bar *there* are *charged forty-six overt acts* as I mentioned a few minutes ago.

Some of them have been proved by the United States.

An overt act need not be an unlawful act, but it must be something done and obviously to manifest and put into effect and definitely show what was the purpose of the conspiracy. The only question with such acts which have been proven or admitted is then whether you find beyond a reasonable doubt that a *particular overt act so alleged* was done for the purpose of effecting the unlawful objects of the alleged conspiracy and was reasonably effective towards accomplishing such design.

It is not necessary for the Government to prove more than one act was done *as alleged.*"

At page R. 827a, the court charged:

"If you find there was a continuing conspiracy based upon the incidents in one of these cases and an overt act committed by one of the parties thereto, the crime would be proved even if the overt act were an incident of an entirely different and separate case, *if that fell within* the *charge of the indictment.*

It may not be proper to clarify the definition of conspiracy by making distinctions in the light of the evidence. No defendant should be convicted upon spec-

ulation or conjecture. No defendant should be convicted because he split fees, or gave part of the money which he may have earned or which may have been given to him by virtue of his official position, to another. No defendant could be convicted of an illegal, unlawful, improper or other unethical act *not charged in the indictment.*"

At page R. 863a we find the following very important portion of the charge:

> "Now, ladies and gentlemen, it will be noticed that between sometime in 1939 and November, 1941, there is considerable sag in the activities of the defendant *which are charged in the indictment,* as connected with the conspiracy and/or those which are shown in the evidence:
>
> You should give this factor serious consideration to determine whether or not there was a continuing conspiracy existing. If you find there was a conspiracy existing theretofore, ripened by an overt act *as charged,* you should still consider whether the alleged conspiracy continued in full force and vigor during this period up until after September 11, 1942, which you will remember is the critical date, *and whether there were overt acts, charged in the indictment,* committed in pursuance of the conspiracy after that date."

At the close of the Charge the attorney for Donald M. Johnson specifically requested the court to make clear to the jury their duty relative to the finding of an overt act within the statutory period and the Judge informed coun-

sel that he had charged twice on that subject and he had no intention of giving a further charge (R. 902a-903a). We might call this court's attention to the fact that if the trial judge had clarified the instruction as requested by defense counsel, there is a possibility that the $350.00 check might have been before the jury as an overt act because the clarification would have removed from prior instructions on the same subject matter the clause, "as charged in the indictment"; and similar expressions, restricting the overt acts to those specifically set forth, being the 46 overt acts alleged.

Later, after some discussion, the trial judge did give an additional Charge as to overt acts, but instead of following the form suggested by defense attorney, he told the jury as follows (R. 907a):

> "The Court also instructed that some of the acts *charged by the Government as overt acts in the indictment had been proved.* However, the Court left open and leaves open to you the question as to whether you find a conspiracy beyond a reasonable doubt and you find an act had been done by one of the conspirators adhering thereto which was done in pursuance of the criminal design and reasonably effective for that purpose. You must find that before you can find that there is an *overt act as charged in the indictment.*"

The indictment is printed at length in the Record p. 1056, and, together with the indictment in the Central Forging Case (R. 537a), taken out by the jury. At page (R. 1081) we find the heading "Overt Acts" and then follow 46 specific overt acts, in none of which is there any

reference to the $350.00 check although references are made to the alleged receipt of other sums of money by Donald M. Johnson in 1934, 1936, 1937 and 1938, all of which the Government failed to substantiate by competent evidence, nor does the Government attempt in any way to connect the $350.00 check with matters set out specifically in the 46 overt acts.

Therefore, we respectfully contend that while the trial judge did submit to the jury the matter of the alleged transaction between Abe Greenes and Donald M. Johnson as to the $350.00 check at pages 869a-870a of the Record, the submission at those two pages has to do only with the alleged general conspiracy and the credibility of Donald M. Johnson. When he instructed the jury on their absolute duty under the law, he very carefully restricted the overt acts to those charged in the indictment, and right or wrong, that was the law of the case so far as the jury were concerned, and the presumption is that they did not find the $350.00 check transaction to be an overt act in this case. Hence, the statute of limitations is a complete bar to the prosecution and conviction of this defendant, petitioner, Donald M. Johnson.

IV. ERROR OF CIRCUIT COURT IN REFUSING TO APPLY DOCTRINE OF RES ADJUDICATA OR ESTOPPEL

As urged in our Petition, Donald M. Johnson had been acquitted of a charge of conspiracy in what is known as the Central Forging Company case. At the trial his Counsel

attempted to put into evidence the entire record of that case to show the facts which had been adjudicated thus in favor of the Petitioner, but the Court refused to permit him to do so, saying that he would take care of the matter later in the case. In the Charge, the Trial Court limited the jury's consideration of this case, so far as concerns the overt acts which are the same in the Central Forging Case and in the case at bar, to the other defendants, excluding your Petitioner, *but he did not take from the jury a consideration of the facts in the Central Forging case, which we submit are the same as those introduced into evidence by the Government in this case.* On appeal, the Circuit Court found no error in the action of the Trial Judge, stating that "Donald M. Johnson is to have the benefit of the Trial Judge's instruction that nothing which occurred that was connected in any way with the Central Forging case should be determined in considering his guilt, etc." However, the Circuit Court misconstrued, we submit, the language of the Trial Judge as found at R. 888a, in which he specifically told the jury that "you shall not consider in this case as to him the overt acts which are mentioned in that Central Forging case indictment * * * In that regard you pay no attention to *those specific acts in the Central Forging Case* as regards Donald Johnson. However, all of the other matters in evidence are also as to him." The Circuit Court found (R. 1233) that the statements of law which we urged on appeal were correct, but refused to apply them to our case. We respectfully submit that in refusing to apply the admittedly correct law to the facts in our case, the Circuit Court decided the case in conflict with that law, namely, *Frank v. Mangum*, 237 U. S. 309; 35 S. C. 582;

Coffey v. United States, 116 U. S. 436, 6 S. C. 437, and similar cases, which hold that "the prior judgment of acquittal is, however, conclusive upon all questions of fact or of law distinctly put in issue and directly determined upon the trial of the former indictment", and the said decision was in conflict with its own decision in the case of *United States v. DeAngelo*, 138 F(2) 466, and in which the United States decisions above-referred to, and others, are followed as the law of the case.

V. CIRCUIT COURT'S ERROR RE THE TRIAL COURT'S REFUSAL TO DECLARE A MISTRIAL BECAUSE OF IMPROPER AND PREJUDICIAL REMARKS OF THE PROSECUTING ATTORNEY.

In his Rebuttal Argument, the Prosecuting Attorney referred to Hoyt A. Moore, a member of the New York Bar, as a "criminal conspirator". Attorney for defendants asked for the withdrawal of a juror and a continuance of the case because of this prejudicial remark of the Prosecuting Attorney (796a-797a; 806a-807a). Mr. Moore had been dismissed as a defendant in this case on Order of Judge William F. Smith, and there was absolutely no basis for the improper remark of the attorney. The name of Donald M. Johnson, your Petitioner, had been brought into the testimony in the Williamsport Wire Rope case, concerning which Mr. Moore testified, and therefore anything referring to that case affected him and would be prejudicial to him. The Circuit Court of Appeals dismissed this action of the Trial Judge as "irrelevant entertainment for the jury",

after referring to the remarks of defendant's counsel that Mr. Moore was a man of fine qualities, an example of an honest man, and a good fellow and a fine old gentleman.

The word "criminal" is not applied to an innocent man. In the case of *Van Riper v. Constitutional Government League* (Washington Supreme Court), 96 P. 2d 588, 125 A. L. R. 1100, after giving the several definitions of the word "criminal" as taken from the standard dictionaries, the court says "we quote these standard lexicons because they give not only the technical but also the popular meaning of the word 'criminal'. In consulting such works the layman would receive the impression, if he did not already have it, that the term 'criminal' implies a wicked or heinous act."

In *New York Life Insurance Co. v. Doerksen*, 75 F (2) 96 (CCA 10), the counsel for the plaintiff referred to an important witness who performed the autopsy as a "butcher". The court struck out the remark but the appellate court considered that such action was not sufficient on the part of the Trial Judge. In the course of the Opinion, the court called attention to the case of *New York Central Railway v. Johnson*, 279 U. S. 310, 49 S. C. 300, where a judgment was reversed solely because of inflammatory remarks of counsel. Mr. Moore was a very important witness on behalf of the defendants and characterizing him as a "criminal conspirator" could not be but highly prejudicial to them.

VI. THE DECISION OF THE CIRCUIT COURT RELATIVE TO THE EFFECT OF CHARACTER EVIDENCE IS IN CONFLICT WITH EDGINGTON v. UNITED STATES

The Circuit Court held in this case that the Charge of the Court Below was proper concerning character evidence. The entire decision of the Circuit Court on this subject reads as follows (R. 1230):

> "1. Several of the appellants complain about the charge of the Trial Judge concerning character evidence. On this point the Judge charged as follows: 'The evidence of the good reputation of a defendant for honesty and being a law-abiding citizen is admissible in this case. It is substantive evidence and is entitled to weight in your determination. The Government is bound to prove the charge as against any defendant beyond a reasonable doubt, based on all the evidence. If you find that the charge has so been proved as against any defendant, giving weight to the substantive evidence of good reputation, you may find him guilty.
>
> 'In this connection, you may consider that persons who may have the best reputations in their communities have heretofore been known to have committed crime. While, therefore, it is your duty to weigh and consider such evidence, you are not bound to find the defendant innocent simply because he possessed a good reputation before indictment. If after considering all the evidence, including the evidence of good reputation,

there is reasonable doubt as to the guilt of the defendant existing in your minds, you may acquit him.'

"We think this charge was correct and within the decision of this Court in United States v. Quick, 128 F. 2d 832 (C.C.A. 3, 1942) and the later reiteration of the doctrine of that case in United States v. Frischling, 160 F. 2d 370 (C.C.A. 3, 1947)."

It will be noted that the Court states that the Charge as given was correct and within the decisions of its own court in *United States v. Quick* and *United States v. Frischling*. Our complaint is that the Charge is not in accordance with the decision of the United States Supreme Court in *Edgington v. United States*, 164 U. S. 361, 17 S. C. 72.

Donald M. Johnson, your Petitioner, is a former District Attorney, and has been engaged in the practice of law in the Middle District of Pennsylvania since March, 1929, when he was admitted to the Bar (R. 664a). The following witnesses testified as to the good character or reputation of Donald M. Johnson, your Petitioner:

Dr. Friedman Cathrall, Physician, Scranton, Pa. (575a, 576a).

Judge A. Francis Gilbert, Judge of the Common Pleas Court of Union and Snyder Counties, who had appointed Donald Johnson as District Attorney at one time (725a).

Frank A. Attinger, Snyder County Superintendent of Schools (727a).

Horace W. Vought, District Attorney of Snyder County (728a).

Reverend H. D. Snyder (730a).

Elmer E. Dinius, Sheriff of Snyder County (732a).

Evan B. Hassinger, Prothonotary of Snyder County (733).

These several witnesses testified that the general reputation of Donald M. Johnson for honesty and for being law-abiding was "excellent" (Dr. Cathrall); "very good" (Judge Gilbert); "excellent" (Mr. Attinger); "very good" (District Attorney Vought); "very good" (Reverend Snyder); "very good" (Sheriff Dinius); and "very good" (Prothonotary Hassinger).

It is very important to note that although Donald M. Johnson put his good character and reputation in evidence by producing the foregoing witnesses, the Government wholly failed either to impeach these witnesses or produce contradictory testimony.

We quote the following from the Opinion in the *Edgington Case* which reversed the Lower Court, stating:

> "Whatever may have been said in some of the earlier cases, to the effect that evidence of good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. *The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt*, although, without it, the other evidence would be convincing."

And in the case of *Sunderland v. United States,* 19 F. 2d 202, 215 (CCA 8) it was held that although a defendant may not require a charge in the exact words of the Edgington case, he is entitled to a charge which comports with the rule of that case by instructions which set forth (1) *the purpose and function of character evidence, i.e., to generate a reasonable doubt;* (2) the probative status of such evidence, i.e., that it be considered by the jury regardless of whether the other evidence in the case is clear or doubtful, and (3) the possible effect of character evidence, i.e., that when considered along with the other evidence in the case, if a reasonable doubt exists as to the defendant's guilt, he is entitled to an acquittal.

In our case, it is important to note that nowhere does the Charge tell the jury that the purpose and function of character evidence is to generate a reasonable doubt. In *Miller v. United States,* 120 F 2d 968, (CCA 10), following the Edgington case, the Circuit Court found that the instruction given was too narrow, saying "It does not tell the jury that character testimony may be such that it alone may create a reasonable doubt, although without it the other evidence would be convincing."

At page 904a of the Record in our case, we find that the attorney for the defendant took a specific exception to the portion of the Charge quoted in the Opinion of the Circuit Court as above noted. It was and is the position of your Petitioner that the very meager instruction given on this subject, all of which is set forth in the quotation from the Circuit Court's Opinion above-referred to, excepting a final statement that the Judge called attention to the fact that he had limited the number of character witnesses in order

to save time, and that they should consider that the defendants might each have called many more character witnesses if the court had not taken such action. We respectfully submit that the Charge on this point was not only inadequate but that it falls far short of what a Trial Judge is required to instruct the jury in accordance with the law as laid down by the United States Supreme Court.

In *Mannix v. United States*, 140 F 2d 250, the Circuit Court for the Fourth Circuit sets forth, at page 253, the divergence of opinion in the several circuits as to the interpretation of the Edgington case. In referring to the courts of the second, third, which is our circuit, fifth, eighth, and ninth, the Judge states that it has now been decided in these circuits that it is proper for the court to instruct the jury as to the value and weight of reputation of good character. We respectfully submit that such instruction was entirely omitted in our case.

VII. ERROR OF CIRCUIT COURT IN AFFIRMING TRIAL JUDGE'S CHARGE RELATIVE TO BEGINNING AND ENDING OF CONSPIRACY AND IN TAKING FACTS FROM JURY

Nowhere in the Charge of the Court did it appear that the Trial Judge charged the jury that they must find the date of the beginning of the alleged conspiracy and the date of its end. We respectfully submit that the action of the Circuit Court in affirming the Judge's Charge overlooks the fact that in an alleged conspiracy involving so many

persons it is important to know the date of the beginning and the end of the same, because it is the law that a particular defendant cannot be found to have any connection with the conspiracy unless it is formed prior to his becoming a member thereof, and by the same token, if a conspiracy was completely ended, no action of defendant would make him a party thereto at that late date. The Government in our case has wholly failed to prove an agreement among any of the defendants, but relied solely upon the inferences to be drawn from the activities in the various cases of one or more of the defendants. Let us take, for example, the matter of the Williamsport Wire Rope case, the last act which was in December of 1938. Obviously, if a general conspiracy had been formed in 1940, no action of any person connected therewith prior to the date of the formation of the conspiracy would be admissible or could be considered as overt acts because they would not be in pursuance of the conspiracy. The same is true as to the termination of the general conspiracy if any.

In his Charge at 821a the Judge said "In the Indictment in the case at bar there are charged 46 overt acts, as I mentioned a few minutes ago. Some of them have been proven by the United States." Whether or not a fact has been proven is for the jury and not for the court. In *Marrach v. United States*, 168 Fed. 225 (CCA 2), the general proposition is stated thus at page 229:

> "We are convinced that the questions, whether a conspiracy existed as charged in the indictment, and whether an act was done by one or more of the defendants to effect the object of conspiracy were clearly questions of fact for the jury."

In *United States v. Olmstead,* 5 F 2d 712, it is said "Whether the alleged overt act is such is a question of fact for the jury". In *United States v. Murdock,* 299 U. S. 389, 54 S. C. 223, it is said at page 225:

> "A federal judge may analyze the evidence, comment upon it, and express his views with regard to the testimony of witnesses. He may advise the jury in respect of the facts, but the decision of issues of fact must be fairly left to the jury. Patton v. United States, 281 U. S. 276, 288, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263; Quercia v. United States, 289 U. S. 466, 53 S. Ct. 698, 77 L. Ed. 1321."

It is respectfully submitted that for the reasons hereinbefore set forth, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,
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